Supreme Court, U.S.
FILED
OCT 31 2006
OFFICE OF THE CLERK

No. 06-__ 06-611

IN THE

Supreme Court of the United States

MICHAEL FRANKLIN GREEN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Petitioner's conviction is in violation of the Ex Post Facto clause of Article I, section 10, clause 1 of the United States Constitution?

Whether the Florida Supreme Court has created and enforced laws that have abridged the privileges and immunities of the Petitioner in violation of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

Supreme Court of the United States

No. 06-___

MICHAEL FRANKLIN GREEN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

[√] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at ____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

The opinion of the Nineteenth Judicial Circuit court appears at Appendix D to the petition and is

[ ] reported at ____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

JURISDICTION

[√] For cases from state courts:

The date on which the highest state court decided my case was October 4, 2006. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix __.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ___ (date) on ___ (date) in Application No. __A__.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Article I, section 10, clause 1 of the United States Constitution.

Fourteenth Amendment to the United States Constitution.

Article I, section 15(a) of the Florida Constitution.

Article II, section 3 of the Florida Constitution.

Florida statutes § 794.011(2).

STATEMENT OF THE CASE

On March 27, 1990, the Petitioner was arrested and charged for capital sexual battery, pursuant to Florida statute § 794.011(2), in the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, case number 90-808-CF. The Petitioner's judgment and sentence were *per curiam* affirmed on appeal. *Green v. State*, 591 So.2d 639 (Fla. 4th DCA 1992).

On August 24, 2003, the Petitioner filed a Motion for Postconviction Relief, pursuant to Florida Rules of Criminal

Procedure 3.850. On September 18, 2003, the trial court denied relief. (App. D).

The Petitioner appeal[illegible]he decision. On December 31, 2003, the Fourth District Court of Appeal *per curiam* affirmed the appeal. On January 14, 2004, the Petitioner filed a motion for rehearing. On February 5, 2004, the court denied the rehearing. On February 27, 2004, the mandate was filed. (App. C).

The Petitioner filed a Petition for a Writ of Certiorari with the Florida Supreme Court on June 22, 2006. That Court assigned case number SC06-1242 and treated this Writ as a Writ of Habeas Corpus. Citing *Baker v. State*, 878 So. 2d 1236 (Fla. 2004), the Florida Supreme Court denied the Writ on October 4, 2006. (App. A).

This petition timely follows.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant this petition because the trial court violated ex post facto laws by relying on 1990 laws for an offense supposedly committed in 1977, in violation of Article I, section 10, clause 1 of the United States Constitution, and the Florida Supreme Court created and enforced laws that have abridged the Petitioner's immunities to a true capital crime in violation of the Fourteenth Amendment to the United States Constitution.

On March 27, 1990, the Petitioner was arrested for and charged by information for capital sexual battery, pursuant to Florida statute § 794.011(2), for incidents that allegedly occurred in 1977.

After the alleged crimes but prior to the Petitioner being arrested, the Florida Supreme Court held that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault. See *Buford v. State*, 403 So.2d

943, 951 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 103 S.Ct. 1037, 71 L.Ed.2d 319 (1981).

At that time, the Florida Supreme Court did not announce a retroactivity to its decision. See *Witt v. State*, 387 So.2d 922 (Fla. 1980). Since the court never gave this decision a retroactive application, the laws in effect at the time of the alleged offense (1977) were the laws that were supposed to be relied on at the time the Petitioner was tried (1990).

Article I, section 10, clause 1 of the United States Constitution provides that: "No State shall . . . [pass any . . . ex post facto Law."

Since the *Buford v. State, supra*, decision, the courts of the State of Florida have held that a person may be tried by information instead of indictment because sexual battery is not a capital felony. See *Heuring v. State*, 513 So.2d 122, 123 (Fla. 1987).

The Florida Legislature had not amended Florida statute § 794.011(2) between the years of 1977 and 1990, to be in keeping with the Florida Supreme Court. Therefore, legislative intent for this offense was clear and unchanged.

Florida statute § 794.011(2) (1977) provides: "A person 18 years of age or older who commits sexual battery upon, or injures the sexual organ of a person 11 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in §§ 775.082 and 921.141."

Florida statute § 794.011(2) (1989), provided: "A person 18 years of age or older who commits sexual battery upon, or injures the sexual organ of a person 12 years of age or younger in an attempt to commit sexual battery upon said person commits a capital felony punishable as provided in §§ 775.082 and 921.141."

In spite of the statutory classification, the courts are holding that the offense is not capital because death can no longer be imposed after the *Buford v. State, supra*, decision and that a person could be charged by information.

The Petitioner's alleged offenses occurred prior to *Buford*. Prior to *Buford* an indictment was required for the charging of capital sexual battery in order to invoke the jurisdiction of the circuit court over the case.

Milliken v. State, 398 So.2d 508, 508-509 (Fla. 5th DCA 1981) held: "Article I, section 15(a), clearly prohibits any person from being tried for a capital crime without presentment or indictment by a grand jury. *Lowe v. Stack*, 326 So.2d 1 (Fla. 1975); *State ex rel. Manucy v. Wadsworth*, 293 So.2d 345 (Fla. 1974). This is so notwithstanding the fact that defendant never faced nor in fact was sentenced to death. *Howard v. State*, 385 So.2d 739 (Fla. 3d DCA 1980); *Bradley v. State*, 374 So.2d 1154 (Fla. 3d DCA 1979)."

Since, in 1977, an indictment by a grand jury was required for the charging of capital sexual battery and the Petitioner never faced death, the state failed to invoke the trial court's jurisdiction over the cases.

The Fifth District further held in *Milliken v. State, supra*: "A trial under an information charging a capital felony is void and the adjudication must be reversed. *Howard v. State.* Appellant's failure to move to dismiss the information either before or during trial is not fatal since the defect affected the jurisdiction of the circuit court to proceed to trial."

This was the law at the time of the alleged offenses in 1977, and it is the law that was supposed to be relied on at trial in 1990.

This court held in *Gerstein v. Pugh*, 420 U.S. 103, 105, 95 S.Ct. 854, 859, 43 L.Ed.2d 54 (1975): "In Florida, indictments are required only for the prosecution of capital offenses."

Therefore, the trial court's reliance on the *Buford* decision for the Petitioner's alleged offense from 1977 was an ex post facto violation because this decision was applied to events occurring before the date of the Florida Supreme Court's decision.

This court held in *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 896, 137 L.Ed.2d 63 (1997): "To fall within the ex post facto prohibition, a law must be retroactive—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it,' *id.*, at 29, 101 S.Ct., at 964, by altering the definition of criminal conduct or increasing the punishment for the crime, see *Collins v. Youngblood*, 497 U.S. 37, 50, 110 S.Ct. 2715, 2723, 111 L.Ed.2d 30 (1990)." See also *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The Petitioner was/is disadvantaged by this decision by the Florida Supreme Court's altering of the definition of the sexual battery statute by holding that now the death penalty is not a possible punishment for capital sexual battery. The decision of *Buford v. State, supra*, has a retrospective effect rather than retroactive.

The trial court's reliance on this decision to try an offense dating prior to the decision has denied the Petitioner his absolute rights to indictment by a grand jury, a twelve-member jury, a separate proceeding before the trial jury for determination of sentence, and direct review to the Florida Supreme Court.

This abuse of discretion by the trial court violated the Ex Post Facto Clause of Article I, section 10, clause 1 of the United States Constitution, thereby, denying the Petitioner of substantive due process as prohibited by the Fourteenth Amendment to the United States Constitution.

This court held in *Washington v. Glucksburg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997):

"Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and traditions' . . ., and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed . . .'. Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest . . . our nations legal traditions, and practices thus provide the crucial 'guidepost for responsible decisionmaking . . .', that direct and restrain our exposition of the Due Process clause. As we stated recently in *Flores*, the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest . . .'" (Internal citations omitted).

The fundamental liberty interest denied the Petitioner was an indictment by a grand jury, pursuant to Article I, section 15(a) of the Florida constitution, in order to invoke the subject matter jurisdiction of the trial court to conduct the trial. See *Milliken v. State, supra.*

It is a part of our Nation's history, as well as the state's history, legal traditions and practices that a defendant must be tried for a capital crime by indictment. Without an indictment charging this capital crime, the state lacked standing to prosecute, and the trial court was without subject matter jurisdiction over the case; therefore, no trial for a capital crime was authorized. This is so, especially since the Petitioner's alleged offenses occurred prior to *Buford v. State, supra.*

This concept is deeply rooted in our Nation's and State's legal traditions and would shock the conscience of the people of the state of Florida if they knew that one can be tried for a

capital crime by information, in violation of Article I, section 15(a) of the Florida Constitution.

The Petitioner's continued incarceration is because of the Florida Supreme Court's creating and enforcing a law that abridged the privileges or immunities of the Petitioner, a citizen of the United States.

The Fourteenth Amendment, section 1 of the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . ."

As stated before, the Florida Legislature never amended Florida statutes § 794.011(2), between the years of 1977 and 1990, except for the age of the victim, thereby, showing legislative intent.

This Court held in *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992): "In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . when words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' . . ." (Internal citations omitted).

The people of the State of Florida have not approved an amendment to Article I, section 15(a) of the Florida constitution by adding non-death penalty capital felonies under the provision to be charged by information.

The Florida Supreme Court held in *Armstrong v. Harris*, 773 So.2d 7, 22 (Fla. 2000): "Under our constitutional form of government in Florida, the Legislature is authorized to enact statutory laws, and the courts can define the common

law, but only the people—by direct vote—can delineate the organic law."

Since neither the Florida Legislature nor the people of the State of Florida have demonstrated any desire to amend these provisions, the Florida Supreme Court has created and is enforcing its own laws concerning these provisions, in violation of the separation Powers Clause of Article II, section 3 of the Florida Constitution.

The power of any court is derived from the government which created it, and is limited to or by the instruments conferring such power. In Florida, the ultimate source of all judicial power is the Constitution; statutory allocation of jurisdiction of the courts of the state is broadly defined in the Constitution; the legislature is authorized to further define a court's jurisdiction, so long as the jurisdiction as redefined, is not in conflict with the Constitution. Courts cannot assume jurisdiction not granted them by the Constitution or by statute or which has been expressly denied.

This Court held in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 S.Ct. 1003, 1016, 140 L.Ed.2d 210 (1998): "While some of the above cases must be acknowledged to have diluted the absolute purity of the Rule the Article III jurisdiction is always an antecedent question, none of them even approach approval of the doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this court from the beginning . . . Much more than legal niceties are at state here." (Internal citations omitted).

The charging of capital sexual battery by information violated due process as prohibited by the Fourteenth Amendment and fails to properly invoke the jurisdiction of the trial court

over the subject matter of the Petitioner's case, from charging to present. This produced nothing more than a hypothetical judgment (advisory opinion), which is disapproved by this Court. Therefore, much more than legal niceties are at stake here. A person's life and liberty are at stake. The Constitution and laws of the United States and the State of Florida hold that the trial proceedings in the instant case are absolutely void due to the lack of subject matter jurisdiction.

WHEREFORE, the Petitioner's conviction is a violation of the due process principles as established by this Court in *Fiore v. White*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL FRANKLIN GREEN
Pro Se
Polk Correctional Institution
10800 Evans Road–F2217L
Polk City, Florida 33868

October 31, 2006

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA
Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NUMBER: SC06-1242
Lower Tribunal Case Number: 90-808-CF

MICHAEL FRANKLIN GREEN

vs.

STATE OF FLORIDA

June 27, 2006

ACKNOWLEDGMENT OF NEW CASE

The Florida Supreme Court has received the following documents reflecting a filing date of 6/22/2006.

Petition for Writ of Certiorari

The above petition has been treated as a Petition for Writ of Habeas Corpus.

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

cc: Michael Franklin Green
Louis A. Vargas
Hon. Charles J. Crist, Jr.
Hon. Edwin M. Fry, Jr., Clerk

SUPREME COURT OF FLORIDA

CASE NO. SC06-1242
Lower Tribunal No.: 90-808-CF

MICHAEL FRANKLIN GREEN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Wednesday, October 4, 2006

Because the Court has determined that relief is not authorized, this case is hereby dismissed. *See Baker v. State*, 878 So. 2d 1236 (Fla. 2004). Any motions or other requests for relief are also denied.

WELLS, ANSTEAD, PARIENTE, QUINCE, and BELL, *JJ.*, concur.

A True Copy
Test:

/s/ Thomas D. Hall [Seal]
THOMAS D. HALL
Clerk, Supreme Court

mc
Served:
Michael Franklin Green
Rosa H. Carson
Hon. Edwin M. Fry, Jr., Clerk
Hon. Charles J. Crist, Jr.

APPENDIX B

SUPREME COURT OF FLORIDA

[Filed August 31, 2005]

Case No.: SC05-1134

MICHAEL FRANKLIN GREEN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Because the Court has determined that relief is not authorized, this case is hereby dismissed. *See Baker v. State*, 878 So. 2d 1236 (Fla. 2004). Any motions or other requests for relief are also denied.

WELLS, ANSTEAD, LEWIS, QUINCE and CANTERO, *JJ.*, concur.

A True Copy
Test:

/s/ Thomas D. Hall [Seal]
THOMAS D. HALL
Clerk, Supreme Court

mc
Served:

Michael Franklin Green
Hon. Charles J. Crist, Jr.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

[Filed December 31, 2003]

Case No. 4D03-4298

MICHAEL FRANKLIN GREEN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Appeal of order denying rule 3.850 motion from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Dwight L. Geiger, Judge; L.T. Case No. 90-808 CF.

Michael Franklin Green, Polk City, pro se.

No appearance required for appellee.

PER CURIAM.

AFFIRMED.

STONE, WARNER and KLEIN, JJ., concur.

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF FLORIDA FOURTH DISTRICT,
P.O. BOX 3315,
WEST PALM BEACH, FL 33402

[February 5, 2004]

CASE NO.: 4D03-4298
L.T. No. 90-808 CF

MICHAEL FRANKLIN GREEN,
Appellant/Petitioner,

v.

STATE OF FLORIDA,
Appellee/Respondent.

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed January 14, 2004, for rehearing and rehearing en banc is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Joanne Holman, Clerk
Michael Franklin Green
Attorney General—W.P.B.
mg

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk [Seal]
Fourth District Court of Appeal

MANDATE

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable GARY M. FARMER, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE:	February 27, 2004
CASE NO.:	4D03-4298
COUNTY OF ORIGIN:	St. Lucie
T.C. CASE NO.:	90-808 CF
STYLE:	MICHAEL FRANKLIN GREEN v. STATE OF FLORIDA

[Seal]

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

ORIGINAL TO: Joanne Holman, Clerk
cc: Michael Franklin Green
Attorney General—W.P.B.

cs

APPENDIX D

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

Felony Division Case No. 90-808-CF

STATE OF FLORIDA,

vs.

MICHAEL FRANKLIN GREEN,
Defendant.

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court in Chambers on the Defendant's Motion for Postconviction Relief filed on August 24, 2003, pursuant to Florida Rule of Criminal Procedure 3.850. The Court finds and decides as follows:

The Defendant was found guilty by jury verdict on two counts of Sexual Battery. The Defendant was sentenced on each count to a term of Natural Life with a 25 year mandatory minimum, with the sentence on Count II to run concurrent to the sentence on Count I. The Court classified the Defendant as a Mentally Disordered Sex Offender and committed him to the custody of the Department of Corrections. The Defendant's judgment and sentence were per curiam affirmed on appeal. *Green v. State*, 591 So.2d 639 (Fla. 4th DCA 1992). The Defendant has filed several postconviction motions.

In the instant motion, the Defendant seeks to challenge his conviction. The Defendant's motion is untimely filed more than two years after the judgment became final without alleging a bonafide exception to the time limitation. *Fla. R. Crim. P.* 3.850(b).

The Defendant's motion is denied.

DONE AND ORDERED in Chambers in Fort Pierce, Florida, this 18th day of September, 2003.

/s/ Dwight L. Geiger
DWIGHT L. GEIGER
Circuit Judge